COLUMBIA LAW REVIEW.

Issued monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

FEBRUARY, NINETEEN HUNDRED AND SIXTEEN.

NOTES.

NEW YORK JOINT STOCK COMPANIES AND THE FEDERAL CORPORATION TAX.—The application of the Federal Corporation Tax to joint stock associations raises a question as to the nature of such associations when endowed by statute with many of the characteristics of corporations,—a question on which courts have had difficulty in coming to an agreement. The joint stock form of organization made its appearance in England as a voluntary association of adventurers without authorization from crown or parliament,[1] differing from the ordinary partner-

[1]Lindley, Companies (5th ed.) 1 *et seq.*; see Evans, The Evolution of the English Joint Stock Limited Trading Company, 8 Columbia Law Rev., 339. Massachusetts applies the title "joint stock company" to a corporation organized under general laws, Attorney-General *v.* The Mercantile Marine Ins. Co. (1877) 121 Mass. 524, but recognizes partnership associations with transferable shares, Hoadley *v.* County Commissioners (1870) 105 Mass. 519; Ricker *v.* American Loan etc. Co. (1885) 140 Mass. 346, 5 N. E. 284, even when called joint stock companies in the State of their origin. Edwards *v.* Warren Linoline etc. Works (1897) 168 Mass. 564, 47 N. E. 502; Boston & Albany R. R. *v.* Pearson (1880) 128 Mass. 445.

ship in the fact that its capital was divided into transferable shares and that it was not dissolved by the death of a member. The multitude of fraudulent enterprises organized in this way led to drastic legislation in the form of the famous Bubble Act,[2] but after the repeal of the Act it was finally decided that the joint stock company was a legitimate form of common law partnership when organized for a lawful purpose.[3]

In this country the Bubble Act appears never to have been enforced and joint stock companies may exist by virtue of the common law.[4] But the impracticability of bringing suit by or against all the members, as the law of partnership requires, would make the form of organization unavailable for large enterprises. In New York, however, a statute in 1849[5] authorized suit in the name of an officer, who for this purpose became practically a corporation sole,[6] and this led to the carrying on of business in the joint stock form by large organizations, notable among which are the great express companies. Other statutes provided that the president must be sued before a creditor could proceed against a stockholder as a partner,[7] and authorized the holding and the conveying of real estate by the president for the company.[8] These rights could not have been secured by any common law agreement but are conferred by the state, and it is contended that the legislature by conferring rights peculiar to corporations incorporates the recipient, even though it expresses the contrary intention.[9] Such a doctrine has been applied by a majority of the United States Supreme Court to English joint stock companies, which are governed by comprehensive statutes, conveying many corporate characteristics but denying any intention to incorporate.[10] In New York corporations were held to be created without words of incorporation where a form of organization with perpetual succession and stockholders' exemption from liability was authorized to carry on the business of banking, at that time forbidden to private persons.[11]

---

[2]6 Geo. I, c. 18, § 18.

[3]Lindley, Companies (5th ed.) 133; Walburn *v.* Ingilby (1833) 1 Myl. & K. 61, 76; Garrard *v.* Hardy (1843) 5 M. & G. *471; Harrison *v.* Heathorn (1843) 6 M. & G. *81; *Re* Mexican & South American Co. (1859) 27 Beav. 474. It is even doubted whether partnerships with transferable shares were illegal *per se* under the Bubble Act. The King *v.* Webb (1811) 14 East *406.

[4]Phillips *v.* Blatchford (1884) 137 Mass. 510; Spotswood *v.* Morris (1906) 12 Idaho 360, 85 Pac. 1094.

[5]Laws of 1849, c. 258, extended by Laws of 1851, c. 455, and Laws of 1854, c. 245.

[6]See Westcott *v.* Fargo (1875) 61 N. Y. 542.

[7]Laws of 1853, c. 153; repealed by N. Y. Code Civ. Proc., § 1923.

[8]Laws of 1867, c. 289. The statutory law on the entire subject is now found in the Joint Stock Association Law. Consol. Laws of 1909, c. 29.

[9]The various acts declared that they did not incorporate the companies and Art. 1, § 2 of the present Joint Stock Association Law, *supra,* provides that a joint stock association "does not include a corporation".

[10]Liverpool Ins. Co. *v.* Massachusetts (1870) 77 U. S. 566. Acts of Parliament provided for a distinctive name, statutory suit by its officers, perpetual succession, and suit against it by shareholders, which last the Supreme Court deemed the mark of existence as an entity.

[11]It was first held that banking associations so organized were not corporations and therefore the statute creating them was valid, although not complying with the constitutional requirements for the creation of

The joint stock company existed in New York,—and some of the express companies were actually organized,—before the statutes took effect. The question then is whether subsequent legislation has changed their nature.[12] Although the laws of partnership apply in many respects,[13] a member is not given a partner's right to sue for dissolution,[14] nor is he under a partner's disability to sue the partnership.[15] The laws of corporations have been said to be the best guide to follow, in view of the many corporate characteristics possessed by the associations.[16] The tribunals of other states have been led by this similarity to apply the law of corporations to New York joint stock companies in many cases,[17] although in others they recognize the original character as partnerships.[18] But even though they may be sued by a collective name, stock may be represented by transferable shares, death or insanity of a member may not dissolve them, they may have perpetual succession, and may hold real and personal property, yet the individual rights and liabilities are not merged in the artificial body,

---

corporations. Warner *v.* Beers (N. Y. 1840) 23 Wend. 103. In the later case of Board of Supervisors *v.* People (N. Y. 1844) 7 Hill 504, the Court of Errors and Appeals adopted the rule of the New York Supreme Court treating them as corporations, *Ex parte* Bank of Watertown *v.* Assessors (N. Y. 1841) 25 Wend. 686, but in spite of this, subsequently sustained the constitutionality of the law on the authority of their decision in Warner *v.* Beers, *supra*. Gifford *v.* Livingston (N. Y. 1845) 2 Den. 380.

[12]In their existence before the statute the New York organizations differ from those of Pennsylvania, where the law requires certain procedure for the formation of limited partnership associations. This has been held to create a new legal entity, sometimes spoken of as a quasi-corporation, Briar Hill etc. Co. *v.* Atlas Works Ltd. (1892) 146 Pa. 290, 23 Atl. 326, although it is included in the phrase "any person or corporation". Oak Ridge Coal Co. Ltd. *v.* Rogers (1884) 108 Pa. 147. The general tendency seems to be to treat such organizations as partnerships. Hedge & Horn's Appeal (1869) 63 Pa. 273; Carter *v.* Producers' Oil Co. Ltd. (1897) 182 Pa. 551, 38 Atl. 571.

[13]Survivors must be sued before the executors of a deceased stockholder. Moore *v.* Brink (N. Y. 1875) 4 Hun 402. The formalities of corporate subscription are unnecessary to make one a member. National Bank *v.* Van Derwerker (1878) 74 N. Y. 234.

[14]Waterbury *v.* Merchants' Union Exp. Co. (N. Y. 1867) 50 Barb. 157.

[15]Westcott *v.* Fargo, *supra*. This has been held impossible in England in the absence of statutory authority. Hybart *v.* Parker (1858) 4 C. B. [N. S.] *209.

[16]Waterbury *v.* Merchants' Union Exp. Co., *supra*. This case stated that the only corporate attribute not possessed is the technical one of a common seal. Neither the law of partnership nor of corporations is always applicable to this sort of organization. Thus the Michigan Courts sometimes apply the law of corporations, Rouse, Hazard & Co. *v.* Detroit Cycle Co. (1896) 111 Mich. 251, 69 N. W. 511, and sometimes do not. Attorney-General *v.* McVichie (1904) 138 Mich. 387, 101 N. W. 552.

[17]Edgeworth *v.* Wood (1896) 58 N. J. L. 463, 33 Atl. 940; Express Co. *v.* State (1896) 55 Oh. St. 69, 44 N. E. 506.

[18]Boston & Albany R. R. *v.* Pearson, *supra*; Adams Exp. Co. *v.* Metropolitan St. Ry. (1907) 126 Mo. App. 471, 103 S. W. 583; Metropolitan St. Ry. *v.* Adams Exp. Co. (1910) 145 Mo. App. 371, 130 S. W. 101; People *v.* Rose (1905) 219 Ill. 46, 76 N. E. 42. A similar view is taken by the federal courts. Tyler *v.* Galloway (C. C. 1882) 13 Fed. 477; Gregg *v.* Sanford (C. C. A. 1895) 65 Fed. 151.

as is the case in corporations.[19] The individual liability of the shareholders remains, whereas in corporations the stockholders are not liable except by statute.[20] The Court of Appeals has recognized this and declared the express companies not liable to a tax on all "moneyed and stock corporations".[21] A similar view seems to be taken by the Federal Supreme Court, which refused to treat these companies as citizens of New York for jurisdictional purposes.[22] The provision of the New York Constitution that corporations include joint stock associations[23] seems applicable only to the article in which it appears, and the New York law apparently is that joint stock companies are not corporations.[24]

But the Federal Corporation Tax[25] is not limited to corporations, as it provides that "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, . . . now or hereafter organized under the Laws of the United States or of any state or territory of the United States . . . shall be subject to pay annually a special tax with respect to the carrying on or doing business by such corporation, joint stock company or association . . ." In holding that this did not apply to joint stock associations organized under the common law of Massachusetts without statutory benefits, the Supreme Court said that the language of the Act imported "an organization deriving power from statutory enactment".[26] Since the highest court in New York has declared the express companies liable to a tax on joint stock companies "organized under any law of this State",[27] it is not surprising to find the Federal court in the recent case of *Roberts* v. *Anderson* (C. C. A., 2nd Cir. 1915) 226 Fed. 7, deciding that they come under the provisions of the Federal Statute. Whether corporations or partnerships in the eyes of the United States Courts, the joint stock companies of New York derive such essential powers from the statutes that they may soundly

---

[19]Merchants' Nat. Bank *v.* Wehrmann (1906) 202 U. S. 295, 26 Sup. Ct. Rep. 613; Hoey *v.* Coleman (C. C. 1891) 46 Fed. 221.

[20]People *v.* Coleman (1892) 133 N. Y. 279, 31 N. E. 96.

[21]People *v.* Coleman, *supra*; see Hoey *v.* Coleman, *supra*.

[22]Chapman *v.* Barney (1889) 129 U. S. 677, 9 Sup. Ct. Rep. 426. So also a Pennsylvania limited partnership association is not a citizen of that state for purposes of giving jurisdiction. Great Southern etc. Co. *v.* Jones (1900) 177 U. S. 449, 20 Sup. Ct. Rep. 690.

[23]N. Y. Const., Art. VIII, § 3.

[24]In the opinions of the judges in Hibbs *v.* Brown (1907) 190 N. Y. 167, 82 N. E. 1108, appear such conflicting statements as "of course there can be no doubt that a joint stock association differs from a corporation" and "a joint stock company, whatever else may be said about it, is certainly for most, if not all practical purposes, a legal entity". The fact that the shares are regarded as personalty, Matter of Jones (1902) 172 N. Y. 575, 65 N. E. 570, is not significant, for the same is true of a partner's interest in a ordinary partnership. Van Brocklen *v.* Smeallie (1893) 140 N. Y. 70, 35 N. E. 415. Pennsylvania also treats shares in a joint stock association as personalty. Pittsburg Wagon Works Estate (1903) 204 Pa. 432, 54 Atl. 316; Estate of Oliver (1890) 136 Pa. 43, 20 Atl. 527.

[25]Act of Aug. 5th, 1909, c. 6, § 38, 36 U. S. Stat. L. 112.

[26]Eliot *v.* Freeman (1911) 220 U. S. 178, 31 Sup. Ct. Rep. 360.

[27]People *v.* Wemple (1889) 117 N. Y. 136, 22 N. E. 1046.

be deemed organized under the laws of the State within the intent of the taxing authorities.[28]

THE SITUS OF INTANGIBLE PERSONAL PROPERTY FOR THE PURPOSE OF TAXATION.—The *situs* of personal property for the purpose of taxation is no longer determined by a strict application of the rule *mobilia sequuntur personam.* The rule is now regarded merely as one of convenience, which must yield when the *situs* is obviously not at the domicil of the owner.[1] As to tangible property, therefore, the rule is not often applied, the true *situs* in fact being easily ascertainable.[2] As to intangibles, however, which can have no actual *situs,*[3] the rule is still generally applicable, and they are taxed at the domicil of the owner or creditor.[4] An exception is recognized where the creditor has "localized" the debt or chose in action in a jurisdiction other than that of his domicil.[5] Unfortunately "localization" has not been clearly defined, but it appears from the decisions that its elements usually are, first, the presence within the foreign jurisdiction of the papers evidencing the debt,[6] and secondly, the employment there of the capital represented by the debts in a definite business, usually managed by an agent.[7] The former is not essential, nor is it sufficient, except possibly in the case of specialties.[8] The latter, however, is found in every case

---

[28]The Appellate Division seems to consider as consistent with this doctrine its position that joint stock companies are creatures of contract, existing by virtue of articles of association and not by statute. Matter of Willmer (N. Y. 1912) 153 App. Div. 804, 138 N. Y. Supp. 649; Spraker *v.* Platt (N. Y. 1913) 158 App. Div. 377, 143 N. Y. Supp. 440.

[1]Board of Assessors *v.* Comptoir National (1903) 191 U. S. 388, 404, 24 Sup. Ct. Rep. 109; Liverpool Ins. Co. *v.* Orleans Assessors (1911) 221 U. S. 346, 354, 31 Sup. Ct. Rep. 550.

[2]Union Transit Co. *v.* Kentucky (1905) 199 U. S. 194, 26 Sup. Ct. Rep. 36; D. L. & W. R. R. *v.* Pennsylvania (1904) 198 U. S. 341, 25 Sup. Ct. Rep. 669; discussed in 6 Columbia Law Rev., 190.

[3]Hawley *v.* Malden (1914) 232 U. S. 1, 34 Sup. Ct. Rep. 201.

[4]Kirtland *v.* Hotchkiss (1878) 100 U. S. 491. Conversely, the state may not tax intangibles held by a non-resident, even though the debtor is within the jurisdiction. State Tax on Foreign-held Bonds (1872) 82 U. S. 300. See 5 Columbia Law Rev., 50.

[5]Metropolitan Life Ins. Co. *v.* New Orleans (1909) 205 U. S. 395, 27 Sup. Ct. Rep. 499, discussed in 7 Columbia Law Rev., 531. Catlin *v.* Hull (1849) 21 Vt. 152. The rule of "localization" as interpreted by the Supreme Court is discussed in an article by William Cullen Dennis in 15 Columbia Law Rev., 377.

[6]Board of Assessors *v.* Comptoir Nat., *supra*; New Orleans *v.* Stempel (1899) 175 U. S. 309, 20 Sup. Ct. Rep. 110.

[7]Metropolitan Life Ins. Co. *v.* New Orleans, *supra*; Bristol *v.* Washington Co. (1900) 177 U. S. 133, 20 Sup. Ct. Rep. 746.

[8]Buck *v.* Beach (1907) 206 U. S. 392, 27 Sup. Ct. Rep. 712, discussed in 7 Columbia Law Rev., 531. Justice Day dissented, on the ground that negotiable paper, like a specialty, was the property itself, and therefore capable of acquiring a *situs* by mere presence in the jurisdiction, a view supported by a few previous dicta. See New Orleans *v.* Stempel, *supra,* at p. 322. In Wheeler *v.* New York (1914) 233 U. S. 434, 34 Sup. Ct. Rep. 607, the decision in Buck *v.* Beach, *supra,* is explained on the ground that the notes were only temporarily in Indiana, thus inclining towards the view of Justice Day. A majority of the justices, however, refused to recognize this theory.